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HINDU LAW—RIGHT TO ACCOUNT IN A JOINT FAMILY.

The constitution of a Joint Hindu Family especially under the law of the *Mitakshara* is so peculiar, that it is difficult to find any exact counterpart of it in any of the forms of joint tenure of property familiar to us in the English law. It presents points of similarity to several of these modes of holding property, but the points of difference are equally, if not more, conspicuous. A joint Hindu family may in some respects be compared to a joint tenancy, a partnership, or a corporation, but there are other respects in which it differs from them largely. Great care will have to be used before any safe inferences can be drawn from any partial analogies which may exist between these jural relations. Under what circumstances a managing member of a joint Hindu family is liable to an account at the instance of the other members is a matter which cannot be solved by considerations derived from any one of such analog.es. The authorities upon this subject are scanty and divergent, and it is by no means easy to extract from them a clear and definite answer to all the various questions which may arise in connection with it.

We may first consider the question whether and when, a suit for an account merely will lie against the manager of a joint family at the instance of the other members. Whether an account cannot be claimed in a suit for partition is another matter which we shall presently consider. Is a member of the family entitled to sue for an account, merely with a view of obtaining information as to the way in which the family affairs have been managed, without seeking for further relief, or for an account with the object of ascertaining his share of the profits and carrying it over to his separate account? *Mr. Mayne* seems to think that while a suit would not lie for the

latter purpose, it would for the former and he approves of the decision of the Full Bench in *Abhaychandra Roy Chowdhry* v. *Pyarimohun Gaho*, (5 B. L. R, 347). *Mr. Mayne* has very clearly pointed out that to allow a suit for an account with the object of carrying over a share of the profits to a separate account would be altogether inconsistent with the conception of a joint family and would practically destroy the union of the family, while keeping up the bare semblance of it. (Hindu Law S. 272). Agreeing as we do in his remarks, it is unnecessary for us to say anything further on the subject. But we feel grave doubts as to whether a suit for an account should be allowed merely for the purpose of obtaining information as to the mode of management. In *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (6 M. I. A, 526, at 540), the Supreme Court of Bengal laid down that the right to demand an account was incident to the right to partition and that the liability to account could only be enforced upon a partition. In *Chuckun Lall Singh* v. *Poran Chunder Singh* (9 W. R, 483), the suit was brought for an account of property for a period of 36 years, during which the plaintiff and his brother the defendant had been living in commensality and enjoying the property jointly, and for the recovery of his share of the income. The plaintiff and his brother had already prior to the suit divided the real properties belonging to the family. *Mr. Justice Phear* pointed out that so long as the members who have what may be termed vested interests in the property, choose to continue in a state of commensality and in joint enjoyment of the profits of the property, they cannot be said to possess individually any several proprietary right other than the right to call for partition—a right which they may alien. Every adult member of an undivided Hindu family living in commensality with the manager must be taken as between himself and the manager to be a participator in and authorizer of, all that is from time to time done in the management of the joint property, to this extent, that he cannot without further cause call the manager to account for it. Where however one of the coparceners was a minor, *Mr. Justice Phear* thought that the manager must be considered to occupy a fiduciary relation to him and therefore accountable for his management during the period of minority. In the particular case before him the learned judge held that even the right to call for an account during the period of the plaintiff's minority must be deemed to have been forfeited by laches. In *Nowlaso Kooeree* v. *Lalljee Modi*,

(22 W. R, 202) an observation was made that a suit for an account of joint family property would lie. The question was raised before *Mr. Justice Markby* in *Ranganmani Dasi* v. *Kasinath Dutt,* (3 B.L,R, O. C., 1) and it was held that the manager was not liable to account, even though one of the members of the family was a minor. This decision led to a reference to the Full Bench in *Abhaychandra Roy Chowdhry Gaho,* v. *Pyarimohun,* in 5 B.L.R, 347 in which it was held that a manager of a joint Hindu family is bound to render an account of his management to his co-sharers, and is liable to a suit if he refuses to do so, whether the parties suing were minors or adults during the period for which the account is asked. It was explained by *Sir Richard Couch* that the principle upon which the right to call for an account rests is not the existence of a direct agency or partnership where the managing partner may be considered as the agent for his copartners, but that it depended upon the right which the members of a joint family have to a share of the property and that where there is a joint interest in property, and one party receives all the profits, he is bound to account to the other parties, who have an interest in it, for the profits of their respective shares, after making just deductions. This decision must be taken as having established it as law in Bengal that a suit for an account without any claim for partition would be maintainable by a member of a joint-family. But as *Mr. Mayne* points out, it is difficult to understand the frame-work of the suit. What was claimed was apparently a right to have the amount ascertained upon the taking of the accounts to represent the plaintiff's share of the income carried over to his separate credit. Some of the remarks of *Couch, C. J.,* and the comparison he makes between joint-tenants and the members of a Hindu family also lend support to the view that in his opinion such a claim should be recognised. The recognition of the claim would be utterly inconsistent with the idea of a joint family. All saving and increase of the family funds would be impossible and whether the share of the income thus carried over to the separate credit of a member be treated as separate property, or as the joint property of the family we are equally landed in absurdity. This view has been so effectively disposed of by *Mr. Mayne* that it is unnecessary to say anything further on the matter than that *Sir Richard Couch's* remarks are based upon the very incomplete analogy between a joint family

and joint-tenants. Until partition, not merely is a member of a joint family not entitled to predicate of the *corpus* of the property that any particular portion of it is his, but he is also not entitled to predicate of the income that any portion of it should be his, (Per *Lord Westbury* in *Appovier* v. *Ramasubbier* 11 M. I. A, 75). The fact that inequalities of past enjoyment are not to be taken into account at a partition shows that until partition, the members are not entitled to particular shares of the income and that the income must be deemed to belong to the family as a whole. If any portion of the family income has been saved, the members are of course entitled to a share in the savings at the time of division as part of the partible property irrespective of inequalities of past enjoyment. But if the income has been all consumed for family purposes, any one member cannot claim to recover from the others the difference between his own individual consumption and his share of the family income.

If a suit for account cannot be maintained for the purpose of carrying over a share of the income to a separate account, is there any necessity for allowing it where there is no prayer for partition ? As incidental to a suit for partition, a member of the family should certainly have a right to call for an account for the purpose of ascertaining what funds are available for partition. But to allow a suit for an account simply because a member wants to know how the family is being managed and when, being in a position to sue for partition he does not choose to do so, would enable the junior members to harass the manager, would lead to a multiplicity of suits and would be opposed to the principles on which the courts interfere in such matters.

In the case of partnerships at will to which a joint family bears some resemblance, the courts do not ordinarily entertain a suit for an account, unless there is a prayer for dissolution of the partnership also (Lindley on partnership, p. 495). Exceptions have no doubt been admitted in recent times, but the rule will be followed in the absence of any special reasons to depart from it. The same principle which underlies this rule underlies also the provision in the Civil Procedure Code that a suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. Suppose a Hindu is excluded from the joint family and the manager refuses to maintain him, is he competent to bring a

suit for maintenance against the manager? If he is not, is it not because he ought to claim the higher relief of partition to which he is entitled (*Himmat Singh* v. *Ganpat Singh* 12 B. H. C, 94)? A claim to maintenance under these circumstances is far more urgent than a claim to an account, and if the former cannot be recognised, there is no reason why the latter should be allowed. It may be said that a denial of a suit for an account would put it in the power of a high-handed manager to drive his coparceners to a suit for partition by his own misconduct in refusing to render accounts. But the same argument has been held not sufficiently strong to prevail in the case of a suit for maintenance, and we see no reason therefore why it should be allowed in the case of a suit for an account.

The Bombay High Court is inclined to take the same view as ourselves regarding the competency of a suit for account. In *Meghasham* v. *Vithalrao* (Reported in *West* and *Buhler's Digest* of Hindu Law 2nd Edn. p 765) *Mr. Justice West* observed that the manager is not a trustee required, as in ordinary cases of trusteeship, to keep accounts of his own expenditure, or of that of the ordinary members, or of supplies taken out of the common stock. The remedy for his misconduct is his deposition, or partition in which an adequate account can in general be taken.

We have now to consider what is the nature of the account to which a member seeking partition is entitled as incidental to the principal claim. The nature of the account to be rendered by the manager will depend upon a variety of circumstances. It will depend upon the conduct of the manager and the other members, the nature of the property and the circumstances of the family (per *Sargent, C. J.*, in *Damodardas Maneklal* v. *Uttamram Maneklal* I. L. R., 17 B, 271) Infancy, complete exclusion from the family property, partial exclusion from it, and voluntary leaving of the family residence by a member are all matters which may affect the liability to account in different degrees.

Where a member of a Hindu family seeks partition within a reasonable time after attaining majority, he would be entitled to an account of the management during his infancy. The presumption which would arise in the case of an adult living in commensality with the manager, that he has impliedly authorised the act of

the manager, cannotbe drawn in the case of an infant who by reason of his age is unable to protect his interests (*Chuckhan* v. *Poran* 9 W. R, 483; *Abhaychandra Roy Chowdhry* v. *Pyarimohun Gaho,* 5 B.L.R, 347; West and Buhler's Hindulaw 2nd edition, p. 767.) When a person is competent to take care of his interests and has had opportunities and facilities for doing so, the fact of his acquiescence in the management would lead to the inference that the management has been proper and satisfactory, and the courts would decline to order an account of past transactions. But as such an inference cannot be drawn in the case of an infant, he can, after he comes of age, demand an account, unless he has by subsequent laches or other circumstances disentitled himself to it (*Chuckun Lall Singh* v. *Poran Singh,* 9 W. R, 483).

In *Krishna* v. *Subbanna,* (I. L. R, 7 M, 564) it was held by the Madras High Court that the principle of non-accountability could not be applied in the case of an infant member who had been excluded by the manager from the family house and from enjoyment of the property. The liability of the manager is rested by the learned judges as much on the ground of the plaintiff's infancy, as on the ground of his exclusion. In *Damodardas Manek Lal* v. *Uttamram Manek Lal,* (I. L. R, 17 B, 271. at p. 279) it was stated by *Sir Charles Sargent, C. J,* that it had never been said that members who were minors during the management could not ask for an account, and as they could not be taken to have consented to the management, he held that they were entitled when they attained their majority, to hold the manager liable, not only for acts amounting to fraud, but also where the management had been grossly negligent and prejudicial to their interests. There is however a difference to be observed between the case of a father managing on behalf of his infant son and any other coparcener managing on behalf of his infant coparceners. It would be unreasonable that the birth of a son should immediately impose on the father the necessity of recording every item of income and expenditure (West and Buhler's Hindu law 2nd edition, pp. 767 and 768). It would be highly incongruous, if while a son is bound to pay all his father's debt of a non-immoral character which have resulted from father's extravagance, he can claim an account from his father of the management of the estate during his infancy and hold the father liable for any acts of gross extravagance. In *Ramanna* v. *Venkata,*

(I. L. R, 11 M, 246) the Madras High Court expressed the opinion that a father was not liable to be called upon to account for the income of the family property during coparcenary, not because he has an absolute disposing power either over the family property, or its income, but becaue its presumed from the continuance of the coparcenary, that the expenditure has been acquiesced in by the coparcener.

Where a coparcener has been totally excluded by the manager from the family house and property, it is obvious that there can be no implication of acquiescence in the management and that it would be inequitable to refuse an account of the management during the period of exclusion (*Konerrav* v. *Gurrav*, I. L. R, 5 B, 589).

It may sometimes happen that some portion of the property is enjoyed by one member and the remaining portion by the other member. In such cases unless there is a great disparity between the properties in the enjeyment of the several members, no account will be ordered and where it is ordered, the court will call upon both the parties to render an account of the properties in their respective possession. If one of the parties cannot render an account of the property in his possession, he will not be entitled to claim an account from the other party. In *Konerrav* v. *Gurrav*, (I. L. R, 5 B, 589) the defendants were in possession of the greater part of the immoveable property, but a money-lending business of the value of Rs. 25,000 fell into the hands of the plaintiff. The plaintiffs had been living on their trade, and the defendants on the land. The court refused to order an account holding that the taking of an account would be most difficult and unsatisfactory and that in the absence of satisfactory accounts from the plaintiffs, it would be inequitable to make an one-sided order as to account.

Where the members of the family do not live in commensality and while a portion of the property is enjoyed in common, the remainder is held exclusively by the manager or some other member, the latter may properly be called upon to give an account of the managment of the portion exclusively held.

Where a member is not excluded from any portion of the family property, but voluntarily leaves the family residence and lives elsewhere for reasons of his own, and under circumstances which do not imply any mutual arrangement, the question whether

the manager should be compelled to account is more difficult to answer. On the one hand, it may be said that he cannot be taken to have consented to individual acts of management, of which he was in all probability wholly ignorant. On the other hand, it may be urged that he must be deemed to have acquiesced in the management generally and that in the absence of exclusion or other misconduct on the part of the manager, the latter ought not to be rendered liable to an account. The opinion of the Madras High Court seems to be correct, that if an adult member is not excluded, but chooses to live apart from the manager, as he has not chosen to enforce partition, it may be very reasonable that, apart from the consideration of fraud or misappropriation by the manager, the principle of non-accountability should be applied to him (*Krishna* v. *Subbanna*, I.L.R., 7 M, 564). In cases other than those we have mentioned the general rule has been stated to be that a Hindu coparcener seeking partition cannot demand an account of past income or past transactions, but only a division of the family property actually existing at the date of partition (*Konerrav* v. *Gurrav*, I.-L. R., 5 B, 589 at p. 595; *Lakshman Dada Niak* v. *Ramachandra Dada Naik*, I. L. R, 1 B, 561; *Jugmohan Das Mangaldas* v. *Sir Mangaldas Nathubhoy*, I. L. R, 10 B, 529 at p. 561). The same principle has been applied to the case of family trades also carried on by Hindu joint families (*Samalbhai Nathubai* v. *Someshwar*, I. L. R, 5 B, 38). What is meant however when it is said that no account of past income or transactions can be claimed is, that such an account cannot be claimed for the purpose of making the manager recoup any sum spent by him *bona fide*. A liability to recoup can arise only where fraud, misappropriation or gross and reckless waste can be proved. As well expressed by *Mr. Justice West* in *Meghasham* v. *Vithalrao*, the adult member of a family who sees a way opening for opulence cannot easily free himself from the embarrassment of minor members entitled to share his gains, and the same closeness of connexion which makes them sharers of his gains makes them sharers also in the losses occasioned by his indiscretions, so long as these do not proceed to an outrageous length (W & B, H. L. p. 768). But an account of past income or dealings may be ordered for the purpose of ascertaining the property actually available for partition at the date of suit (*Jugmohun Das Mangaldas* v. *Sir Mangaldas Nathubhoy*. It cannot be said that the other members are bound to accept the *ipse dixit* of the manager as to what property is subject to partition

(*Damodardas Manek Lal* v. *Uttamram Manek Lal*). In the absence of evidence however, the presumption will be, that the property for partition is such as it exists at the time of partition (*West* and *Buhler's* Hindu law 2nd edition, p. 769; *Damordas Manek Lal* v. *Uttamram Manek Lal*, I. L. R, 17 B, 271, at p. 279).

The only question remaining to be considered is, whether a member of a Hindu family has a right to account at the time of partition in the sense that he can call for a share of past profits from the manager. The ordinary rule is that in a partition suit relating to an ordinary joint family mesne profits are not recoverable, as pointed out by the Privy Council in *Shankar Baksh* v. *Hardeo Baksh* (I. L. R, 16 C, 397, at p. 412). By an *ordinary* joint family we think their Lordships intend to refer to the case of a family the members of which are living in commensality, or at any rate, a family in which there is no total exclusion of any member by the manager. In the case of such families where the enjoyment of what is in common may have been unequal, that of some having been greater than that of others, the shares upon a division are still to be the same, the law taking no account of greater or less expenditure, unless the difference be such as to exclude all idea of proportion, the object entirely selfish, or the circumstances of a kind to impute fraud (*Lakshman Dada Naik* v. *Ramachandra Dada Naik*, I. L. R, 1 B, 561). The presumption in regard to the profits would be that they have been either applied for the family benefit or added to the family property, and there can therefore be no claim for profits as distinct from the claim to divide the property in existence at the date of the partition. Where there is a total exclusion of a member by the manager, it would be inequitable to allow the latter to appropriate all the profits to his own use leaving nothing to the other member for the satisfaction of his needs. Though until actual partition or the institution of a suit for partition, the members are not entitled to specific shares and cannot complain of inequality of expenditure, they have all a right to be maintained and if this right is infringed by exclusion, equity demands that the sum required or spent for their maintenance should be first paid out of the family funds, before a division of the property is made. In practice the courts do not inquire what sum of money would be required for the maintenance of any excluded member, but assume as a rough and ready working principle that the needs of all the

members are equal and that the profits must be divided equally. This principle however will be departed from, where it can be clearly shewn that there are exceptional circumstances entitling a member to a larger allowance than others. Suppose that after the exclusion of a member, a managing or other member has to celebrate the marriage or marriages of his daughter or daughters, and that he defrays the expenses out of the family funds. We do not think that the excluded member can at the time of partition claim his share of the profits free of this extraordinary expenditure (West and Buhler's Digest of Hindu Law 2nd Ed., pp. 821 and 822). Such expenditure being expenditure which the family is bound to make, the application of the profits to this purpose will be held to be an application for the benefit of the joint family (*Appa Rao* v. *The Court of Wards*, I. L. R, 5 M, 236, at p. 238).

Where there has been no total exclusion of a member from the family, but different members have been in possession of different portions of the family property, the liability to mesne profits will depend upon the same principles which govern the liability to an account of past dealings. Similarly, where a member of the family voluntarily leaves it and lives separate, he is not entitled to mesne profits, any more than he is entitled to an account of past dealings, unless he can shew that the separation was by mutual consent and arrangement. In the somewhat analogous case of maintenance, it has been recently held by the Madras High Court that in the absence of proof of a wrongful withholding, arrears cannot be claimed (*Mallikarjuna* v. *Durga*, I. L. R, 17 M, 462).

The infancy of a member is by itself no ground for a claim to mesne profits, although it is a ground for an account. As regards the liability of a father for mesne profits it was observed by *Holloway, J.*, in *Tarachand* v. *Reeb Ram*, 3 M. H. C. R, 177 that he was not prepared to say that there was such a legal obligation to frugality as could be enforced by rendering the father liable for all sums which the court might think to have been unreasonably expended from the date of his coming into possession until the date of partition. He went on to state that "the passage in the *Mitakshara* stating the right of the sons to prohibit excessive expenditure, by no means involves the logical consequence, that, if that right of prohibition has not been, or from the non-age of the sons could not

have been exercised, there would be, after the lapse of any period how long soever, a right of restitution. It may be said that the case of a minor requires different consideration; the law counter-balances his disabilities with so many privileges and it may well be that he would be entitled to restitution, although a son of full age would not be. It may also be that the absence of the power of interposition would be a loss attendant upon his disability from which no law could relieve him."

Where some of the properties belonging to a family have been divided and the other properties remain joint, it is not easy to determine whether a right to account or mesne profits should be recognized, and if so, under what circumstances. We apprehend that the solution will depend upon whether the properties divided are sufficient to enable the sharers to meet their reasonable expenses of living out of the shares allotted to them. If the members can meet all fair wants out of their own shares in the divided properties, no one member, whether manager or not, should be allowed to draw upon the income of the common properties in the absence of any legal necessity, and if he does, the inequality in enjoyment ought to be redressed by an award of mesne profits. If on the other hand the properties divided are insignificant and insufficient to enable the members to live upon their shares, the rights of the members to account or mesne profits must be determined in the same way, as if it had been the case of an ordinary joint-family. In this case the family may be said to be practically undivided, while in the former it may be said to practically divided.

The period for which mesne profits may be claimed is not necessarily confined to three years before suit, though there are some cases in which this view seems to have been taken. But as was pointed out by the Judical Committee in *Pirthee Pal* v. *Jowahir Singh* (I. L. R, 14 C, 493 at p. 509) in reference to the provisions of the Civil Procedure Code relating to mesne profits, the claim of a Hindu for an account of the proceeds of the family estate is not strictly a claim for mesne profits. The provisions of the Civil Procedure Code and the Limitation act relating to mesne profits are applicable to suits for land or other property in which the plaintiff has a specific interest, and not to a suit for partition in which the plaintiff has no specific interest until decree. Their Lordships thought it would be preposterous to allege that a plaintiff in a partition suit

could only recover three years' profits. In *Raja Venkata Row* v. *The Court of Wards* (I. L. R., 2 M, 128 at p. 137) the Privy Council awarded mesne profits from the date of dispossession. In *Appa Row* v. *The Court of Wards* (I. L. R., 5 M, 236) the Privy Council laid down that mesne profits from the date of dispossession should be awarded, provided that the plaintiff did not recover mesne profits for a period exceeding three years next before the commencement of the suit. This decision however seems to be inconsistent with the later decision in *Pirthee Pal* v. *Jowahir Singh* and does not discuss the point.

The language of Article 109 of the Limitation Act does not fairly cover the case of a Hindu claiming mesne profits in a Mitakshara family. It provides three years for the recovery of profits of immoveable propertybelonging to the plaintiff which have been wrongfully received by the defendant. It cannot be said that the receipt of the profits by the managing member is wrongful. What is wrongful is the refusal to allow any portion for the other members out of the income received. Again, the words "immoveable property belonging to the plaintiff" suggest rather the ordinary case in which a person owns some definite interest in immoveable property and seems inapplicable to the case of property owned by a Mitakshara family. There is thus no reason why mesne profits should not be claimed for any length of time, provided that the suit for partition to which it is ancillary is not barred.

EFFECT OF NON-JOINDER OF PARTIES IN MORTGAGE SUITS.

In this article I propose to discuss the question as to the effect of non-joinder of parties in a mortgage suit, upon the rights of the various persons interested in the mortgaged property. Section 85 of the Transfer of Property Act which deals with the joinder of parties to a mortgage suit requires that all persons interested in the property must be impleaded therein. The section does not say any thing as to the effect of non-compliance with its provisions. Is the defect under any circumstances fatal to the suit, and if so, is the defect to affect the suit only so long as it does not ripen into a decree, or is it to extend further, rendering null and void the decree passed and all proceedings such as

sale, delivery &c., that may be taken in pursuance of the decree? Again what is the effect of a mortgage decree or of any proceedings thereunder, as against the rights and interests in the property mortgaged, of persons who were not made parties to the mortgage suit? The section itself does not contain any express answers to these questions and we have to deduce the answers from a consideration of the scope and object of the section and the language employed.

Let me first consider as a matter of general law what the effect of non-joinder of parties is. On principle, joinder of the necessary parties is at best only a processual requisite to the proper framing of a suit. Non-joinder cannot affect the validity of the decree that may be passed or of any proceedings that may be taken in execution of the decree. It cannot, so far as the parties to the suit are concerned, diminish the binding character of the adjudication made by the court. The provisions as to joinder and non-joinder of parties to a suit, contained in the Code of Civil Procedure seem to proceed upon the same view. S. 42 provides that every suit shall be so framed as to afford ground for a final decision upon the subjects in dispute and so as to prevent further litigation concerning them. The combined effect of Ss. 26 and 28 is that every person who is interested in the subject matter of a suit should be impleaded therein either as plaintiff or as defendant, and that judgment may be given in favour of one or more of the plaintiffs against one or more of the defendants, according to their respective rights and liabilities, without any amendment of the plaint. Section 32 empowers the court either of its own motion or at the instance of either party, to order the addition as a party to the suit of any person whose presence before the court may be necessary in order to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit. Section 31 expressly enacts that no suit shall fail by reason of misjoinder of parties. There is no express provision as to the effect of non-joinder. The latter part of the first para. in S. 31 seems however to afford a solution to this question. It directs the court to deal in every suit with the matter in controversy so far as regards the rights and interests of the parties actually before it. Non-joinder does not relieve the court from the necessity of having to try and decide the suit so far as the parties thereto are concerned. The court is bound to proceed with the suit

in spite of non-joinder. *Mr. Justice O'Kinealy* in his commentaries upon S. 31 observes "Probably the power given by the last clause of the first paragraph would be held equivalent to a direction to the court not to dismiss suits on the ground of non-joinder merely. Of course there are some suits such as a suit by a contractor on a joint-contract where all the co-contractors must be made parties or the suit will be dismissed, but this is not *solely* because of non-joinder." Indeed Order No. 16, Rule 13 of the Judicature Acts, of which, as it originally stood, the first para. of this section is a *verbatim* reproduction, was amended in 1883 so as to make it clear that no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties. Having regard to the obligation laid upon the court to decide the suit, it is apparent that non-joinder cannot justify the defendant in refusing to submit his rights to the determination of the court. S. 32 which empowers the court to take action at any time and S. 34 which treats the objection as to non-joinder as being liable to waiver and mere failure to raise that objection at or before the first hearing as having the effect of express waiver, seem to recognize the formal character of this defect. It is equally clear from the wording of S. 31 that though the court is bound and required to decide the suit in spite of non-joinder, still its adjudication is strictly confined to the rights and interests of the parties actually before it. The rights of third parties not before the court are not in any way interfered with and the decision arrived at is not binding upon them. Non-joinder cannot enable a plaintiff to claim by virtue of his proceedings any rights against strangers which he may not otherwise have against them. It is worthy of remark that in recognition of this primary rule of justice express provisions are made in the Code (Act XIV of 1882) to prevent any wanton interference with the rights of third parties not bound by the decree (See Ss. 278, 331, 332, 335, &c.)

Such being the effect of non-joinder generally, what is its effect in the case of mortgage suits? How does a violation of S. 85 affect the rights of the various parties interested in the mortgaged property? S. 85 is in these terms: "subject to the provisions of the Code of Civil Procedure, S. 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage, provided that the plaintiff has notice of such interest."

Like many other sections contained in this Act, S. 85 does not appear to have been carefully drawn. The wording appears to be defective and the language employed is not quite happy. The section says that the plaintiff is bound to join only "persons *having* an interest in the property." Who is to decide whether a person has an interest in the property? This has to be decided prior to the institution of the suit. Necessarily the plaintiff is bound to decide the question. There is no provision of law enabling a plaintiff to get the decision of the court beforehand as regards the framing of his suit. It has been held that the plaintiff is bound to join not merely persons having an interest but also those *claiming* an interest—See *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee,* 14 M, I. A, 101; *Syud Emam Momtazuddeen Mahomed* v. *Rajcoomar Doss,* 14 B. L. R, 408. The meaning will perhaps be clearer if the section be worded thus " . . . . . all persons *having or claiming* an interest in the property mortgaged must be joined as parties: provided that the plaintiff has notice of *such interest or claim.*"

Let me first deal with the question as to the effect of the plaintiff's wilful omission to join the necessary parties. All that is said is that he *must* join persons interested in the property as parties if he has notice; and notice as defined by S. 3 includes constructive as well as actual notice. See *Mata Din Kasodhan* v. *Kazim Husain,* I. L. R, 13 A, 432, at p. 435, *Rajaram* v. *Krishnaswami,* I. L. R, 16 M, 301 and *Jugul Kissore Lal Sing Deo* v. *Kartic Chunder Chottopadhya,* I. L. R, 21 C, 116. The definition of notice is so framed as to apply expressly to the case of a person who wilfully omits to make a search in the books kept at the Registration offices': See Macph, mortgage 616, Stokes' (Anglo Indian Codes) note to S. 3 of the Act; I. L. R, 13 A, 432 at p. 529. What then is the character of the duty cast upon the plaintiff? Is the omission to implead, fatal to the maintainability of the suit itself, or is it merely an irregularity involving no nullifying consequences? On this question, there seems to exist a difference of opinion. The use of the word "must" seems to have led to a diversity of views as to the nature of the obligation imposed and as to the effect of its infringement upon the rights of the plaintiff. On the one hand it is maintained that the infraction of this obligation is at best only an irregularity and that the word "must" is used to emphasise the principle that in the absence of joinder,

a third party's rights cannot be affected by the plaintiff's proceedings. The word is intended to signify that if a plaintiff desires that his decree should bind other incumbrancers, he is under an obligation to implead them. The mere fact, for instance, of the plaintiff's mortgage being prior in date cannot serve to defeat a puisne incumbrancer's rights, behind his back. On the other hand, the view is advanced that the obligation as to joinder is imposed as a matter of public law and public policy which cannot in any way be allowed to be controlled by act of parties, but must be carried out by the court itself under any circumstances. In this view, failure to implead will constitute an inherent illegality affecting the suit. The judgment of the majority in the Full Bench case reported at I. L. R, 13 A, 432 and the dissentient judgment of *Mr. Justice Mahmood* upon the scope of S. 85 of the Transfer of Property Act represent the two sides of the question. The position taken by *Mr. Justice Mahmood* that in spite of the use of the term "must," non-joinder is only an irregularity appears to be correct and sound in principle. The employment of the term "must" instead of the usual term "shall," the previous state of the law and the evils that had to be remedied at the time of the enactment of S. 85 are all invoked as sanctioning the view that the Legislature intended to place an insuperable bar in the way of the plaintiff's right of suit unless he impleaded all the necessary parties. I shall proceed to examine the soundness of this view.

In S. 85 we have to consider not '*shall*, the usual word of mandatory import but the term '*must*' itself. It is of course a much stronger expression than '*shall*' and yet it cannot have the force of a legal prohibition. "The statute law when interpreted draws a vast distinction between imperative affirmative mandates and negative words of prohibition. Actions which fall short of full compliance with affirmative rules whether merely directory or imperative are no doubt reprehensible, but they amount only to defects of procedure while acts done in contravention of express legislative prohibitions are *ultra vires*, illegal and without jurisdiction." The word itself (*i.e.* must) is affirmative in its meaning and imperative in its effect "and however imperative such affirmative meaning may be," "it does not convey the force in legal interpretation which is given to express prohibitions as to the actions of the parties to a litigation or of the courts of Justice"

—Per *Justice Mahmood,* I. L. R, 13 A, 432, p. 490. Nor does the state of the law prior to the passing of the Transfer of Property Act justify the rigid construction adopted by the majority of the Full Bench. Previous to the enactment of S. 85, there was much uncertainty and doubt as to the necessity on the part of a mortgagee to implead other incumbrancers in a suit upon his incumbrance. The usual course adopted by a mortgagee was to sue only the mortgagor and to pray for the enforcement of his security upon the mortgaged property, altogether ignoring the existence of subsequent incumbrancers and all other persons interested in the property. When such suits resulted in decrees in favour of the plaintiffs, execution sales of the mortgaged property very often followed as a matter of course without giving those who had the right to redeem, an opportunity to pay off the mortgage debt and thus secure their rights. This naturally led to conflicts between the auction-purchasers on the one hand and all those persons who were not made parties to the mortgage suit. The solution of this conflict of rights very often turned upon the question as to whether a mortgagee is at all bound in law in a suit upon his mortgage to implead the other incumbrancers. At first, the view that there was no obligation to implead the other persons, prevailed—See *Khub Chand* v. *Kalian Das,* I. L. R, 1 A, 240; *Ali Hasan* v. *Dhirja,* I. L. R, 4 A, 518; *Sita Ram* v. *Amir Begum,* I. L. R, 8 A, 324; *Muthora Nath Pal* v. *Chunder money Dabia,* I. L. R., 4 C, 817; *S. B. Shringarpure* v. *S. B. Pethe,* I. L. R., 2 B, 662. Thus it was observed that, in the case of a prior mortgagee his rights and the benefits he took under his contract with the mortgagor could not in any way be affected by the subsequent acts of the mortgagor and that a puisne mortgagee could only take rights subject to the prior rights of the prior mortgagee. And it was maintained that as a prior mortgagee was under no obligation to implead the others, it logically followed that the decree and sale in a suit upon a prior mortgage had the effect of displacing the subsequent incumbrances. In the words of *Mr. Justice West* in the case at I. L. R., 2 B, 662, the then accepted view was that "it was not incumbent on the registered mortgagee desiring to enforce his lien to search for subsequent incumbrancers or purchasers. . . . . And if his proceeding was right, the title acquired under it was complete so as to displace the defendant's title." In this view the question as to the prior mortgagee's knowledge or ignorance of other mortgages

would be perfectly immaterial. In the case of *Ali Hasan* v. *Dhirja*, I. L. R., 4 A, 518, it was held that in spite of non-joinder due to the wilful neglect of the prior mortgagee, the rights of the puisne mortgagee were lost by the auction sale based upon the prior mortgage-decree.—See I. L. R., 4 A, 518 at pp. 527 and 528. The inevitable result of this doctrine of non-liability to implead was that the prior mortgagee was in no case bound to implead the subsequent incumbrancers even though he should happen to have notice of the subsequent claims and that the puisne incumbrancers had always to remain in dread of their interests being taken away from them without their knowledge.

It is difficult to see how a proceeding to which the subsequent mortgagee is not a party can affect his interests. If the prior mortgagee cannot be prejudiced by any subsequent transaction between the mortgagor and a puisne mortgagee, neither can the subsequent mortgagee be deprived of his rights by a transaction or proceeding between the prior mortgagee and the mortgagor alone. Again it is settled law that a mortgagor after the creation of a mortgage can deal with the interest remaining in him as freely as with any other kind of property.—S. 6 of Act IV of 1882. Of course his subsequent alienations will always be subject to the interests he has already created—S. 48. Even express covenants not to alienate the encumbered property, entered into by the mortgagor with the mortgagee have been held to be ineffectual in restraining the mortgagor's powers of subsequent alienation—See *Ali Hasan* v. *Dhirja*, I. L. R., 4 A, 518 at p. 524; *Venkata* v. *Kannam*, I. L. R., 5 M, 184 at pp. 186 and 187; Macph. mortgage (7th Ed.) page 293; and the cases therein cited; Ghose's Law of mortgage, page 157. Now it would be incongruous to hold that the law while allowing on the one hand the unfettered creation of subsequent incumbrances will authorise on the other hand the deprivation of such interests without the knowledge of the persons concerned. The manifest injustice and unsoundness of this position were soon felt and the view was accordingly held that at least in cases where the prior incumbrancer has notice, it is incunmbent upon him to implead the subsequent incumbrancers as a matter of procedure to render his proceedings effectual and binding as against them. This has been held in a series of cases both before and after the Transfer of

Property Act—See *Venkatanarasammah* v. *Ramiah,* I. L. R., 2 M, 108 ; *Venkata* v. *Kannam,* I. L. R., 5 M, 184 ; *Damodar Devchand* v. *Naro Mahadev Kelkar,* I. L. R., 6 B, 11 ; *Shivram* v. *Genu,* I. L. R, 6 B, 515 ; *Venkatachella Kandian* v. *Panjanadien,* I. L. R, 4 M, 213 ; *Shaik Abdulla Saiba* v. *Haji Abdulla,* I. L. R., 5 B, 8 ; *Dullabhdas Dev Chand* v. *Lakshmandas Sarup Chand,* I. L. R., 10 B, 88 ; *Mahammad Sami-ud-din* v. *Man Singh,* I. L. R., 9 A, 125 ; *Gajadhar* v. *Mul Chand* I. L. R., 10 A, 520 ; *Mohan Manor* v. *Togu Uka,* I. L. R., 10 B, 224 ; *Namdar Chaudhri* v. *Karam Raji,* I. L. R., 13 A, 315 ; *Rupchand Dagdusa* v. *Davlatrav Vithalrav,* I. L. R., 6 B, 495 ; *Brojonath Koondoo Chowdhry* v. *Khelut Chunder Ghose,* 14 M. I. A, 144 ; *Sankana Kalana* v. *Virupakshapa Ganeshapa,* I. L. R., 7 B, 146 ; *Radha Pershad Misser* v. *Monohur Das,* I. L. R., 6 C, 317 ; *Zalim Gir* v. *Ram Charan Singh,* I. L. R., 10 A, 629 ; *Gopee Bhundoo Shantra Mohaputtur* v. *Kalee Pudo Banerjee,* 23 W. R, 338 ; *Janki Prasad* v. *Sri Matra Mautangui Debia,* I. L. R., 7 A, 577 ; *&c.*

It is unnecessary to discuss in detail the various cases cited above and it is enough to observe that in all those cases the mortgage suits had terminated in decrees and it was only with reference to proceedings after suit that the question as to the effect of non-joinder appears to have been considered. In none of these cases was non-joinder held to affect the rights of the plaintiff-prior-incumbrancer. It was only the interests of the not-joined puisne incumbrancers that were at stake. Their rights were at first wiped out of existence as against a prior incumbrancer who had obtained a decree upon his prior incumbrance. Subsequently they were respected at least in those cases where the plantiff in spite of notice on his part had not made the incumbrancers parties to his suit. In this state of the law S. 85 was enacted. It would be unreasonable to suppose that the Legislature ever intended to say anything against the right of suit of the prior mortgagee when there was no question at all about it. His rights were all along recognised and given effect to. It would be reasonable to hold that the Legislature intended to legislate upon a matter which was the subject of discussion and about which there was a difference of opinion. And this was only with reference to the rights of the not impleaded incumbrancers. Section 85 appears to have been enacted with a view to protect their interests and to accord legislative

recognition to the theory of plaintiff's liability to implead all the necessary parties of whose interests he may have notice. It appears to be formulated upon the fundamental principle already noticed and to involve the position, that to bind a party it is necessary for a mortgagee to implead the former in his suit, and that otherwise that party's rights cannot be prejudiced. Under this section, it is no longer a matter of option on the part of a plaintiff to implead the necessary parties, if he wants to bind them. The effect of "must" is sufficiently satisfied by adopting this construction. It is not necessary to go further and say that if the plaintiff does not implead, not only third parties could not be affected but also his own right of suit would be legally non-existent. The plaintiff's rights may be left intact without at the same time endangering the interests of not-joined parties. These views are intended to be efficiently conveyed more aptly, as it was perhaps thought, by the use of the term "must" than by the term "shall." "Must" then shows the legal necessity that there exists to implead in a mortgage suit all the parties connected with the property, provided the plaintiff mortgagee has notice. It does not involve the position that failure to do so is an illegality affecting the suit itself and going to its very root. The plaintiff is not bound to implead the others in the sense that if he does not do so, his right will be affected and the proceedings will be null and void. But he is certainly bound to implead in the sense that if he wants his proceedings to be effectual and binding as against them, he is bound to implead them therein.

Again there appears to exist no reported decision prior to Act IV of 1882, upon the effect of the objection of non-joinder in the suit itself to which it relates. The paucity of decisions on this point only points to the conclusion that the objection whenever raised was considered to have been governed by the general law and was all along regarded as one relating to procedure only. It is thus clear that the prior state of the law far from affording any support to the rigid construction of the Allahabad Full Bench only serves to emphasise the correctness of the opposite view.

Again the question whether a command is to be considered as a mere direction or instruction involving no invalidating consequences on its disregard, or as imperative with an implied nullification for disobedience is in the main governed by considerations of

convenience and justice, and where nullification would involve general inconvenience or injustice to innocent persons or advantage to those guilty of the neglect without promoting the real aim and object of the enactment, such an intention ought not to be attributed to the legislature—See Maxwell on statutes, 450, 452; *Per Lush, J.*, in *R.* v. *Ingale*, 2 Q.B. D, 208. Now the result of upholding the theory of illegality will be serious injustice to innocent persons. Take the case of a sale in pursuance of a decree passed in a suit which was defectively framed owing to the wilful neglect of the plaintiff. Are we to hold that the purchaser got nothing by his purchase because the prior proceedings that led up to the sale were all void owing to the defect of non-joinder? Again how are we to reconcile this view with the decisions of the Privy Council that lay down the wholesome principle that an auction-purchaser need not go behind the decree? See *Rewa Mahton* v. *Ram Kishen Singh*, I. L. R., 14 C, 18; *Mothuru Mohun Ghose Mondul* v. *Akhoy Kumar Mitter*, I. L. R., 15 C, 557 at p. 558. Or with the decisions that the certificate of sale cures all previous irregularities? See *Balakrishna* v. *Masuma Biri*, I. L. R, 5 A, 142; *Naigar Timapa* v. *Bhaskar Parmaya*, I. L. R, 10 B, 444. To hold with the Allahabad Full Bench would in effect "throw a great impediment in the way of purchases in executions." It would unsettle very many titles and create much insecurity of property. The Law favors alienation rather than accumulation, and yet to hold that the party-purchaser acquires no right to the property he purchases would end in the "tying up of property" to the detriment of commerce and in opposition to all national or state policy.

Thus in *Chinnan* v. *Ramachandra*, I. L, R, 15 M, 54, the High Court finding that the mortgagor had not been brought on record ordered in second appeal that he may be brought in as a party and that a revised finding may be submitted. The court did not feel bound to dismiss the suit, as indeed it should, if non-joinder was fatal to the suit itself. In *Subban* v. *Arunachellam*, I. L. R, 15 M, 487, the Madras High Court in view to the objection of non-joinder having been raised in the written statement itself, merely remanded the suit in second appeal to the court of first instance for disposal after impleading the necessary parties, that is, the third mortgagor and others. In *Krishnan* v. *Chadayan Kutti Haji*, I. L. R, 17 M, 17 at p. 18, the objection was raised that the decree itself was invalid

because of non-joinder due to the wilful neglect of the plaintiff; but the court in overruling this contention made the following observations, "As he was no party to the decree obtained by the plaintiff, he is not bound by it. But all that he can ask as puisne mortgagee is that he shall be allowed an opportunity of redeeming." "The plaintiff had a right to maintain a suit for the sale of the land to satisfy his mortgage, but having notice of the first defendant's possession as mortgagee ought to have made him a party to the suit." "As defendant No. 1 was no party to plaintiff's suit for sale, he would have been entitled to be afforded an opportunity to redeem . . . " Again in the decisions reported at I. L. R, 10 B, 224, I. L. R, 13 A, 315 &c., already cited and which were passed subsequent to Act IV of 1882, the same view that non-joinder does not invalidate plaintiff's rights was held; See also *Jugul Kissore Lal Singh Deo* v. *Kartic Chunder Chottopadhya*, I. L. R, 21 C. 116.

I shall now pass to another question in connection with S. 85. What is the effect of non-joinder when it is due to no fault on the part of the plaintiff? It cannot of course affect the rights of the plaintiff, for he cannot reasonably be punished for not doing a thing which, under the hypothesis, it was not possible for him to do. Does it affect the rights of those who are interested in the property, but who were however not impleaded in the suit? Section 85 is silent on this point also. It only states a case in which the obligation to implead arises. It does not tell us whether in other cases, the not-joined parties will be bound by the plaintiff's proceedings or not. The primary principle already stated more than once that no man shall be prejudiced by a proceeding to which he is not a party is of universal scope. It is recognised and given effect to in the enactment of S. 85 itself. Its applicability or operation does not in any way become the less, because the plaintiff was ignorant of the claims of third parties in the property mortgaged. The good faith or ignorance of the plaintiff can be no justifying ground for him to deprive another of his vested rights. As regards the rights of the various persons interested in a mortgaged property *inter se*, we may refer to Ss. 48, 60, 75, 91 &c., of Act IV of 1882. Section 75 declares by reference the rights of prior mortgagees against subsequent mortgagees and *vice versa*. These rights are given as a matter of law and quite irrespective of the wishes of the parties against whom such rights may have to be exercised.

Thus a subsequent mortgagee has as against a prior mortgagee all the rights which the mortgagor himself has, see I. L. R, 4 A, 518, and S. 75 of Act IV of 1882. The subsequent mortgagee "may contest the amount claimed under the prior mortgage and raise any other pleas which might have the effect of wholly or partially relieving the property from the prior liability sought to be imposed thereupon"; and he may offer to redeem the prior mortgagee or seek to foreclose his mortgage as against subsequent incumbrancers. Does non-joinder deprive for instance, a puisne mortgagee of his aforesaid rights because a prior mortgagee has obtained a decree upon his prior mortgage and the non-joinder of the puisne mortgagee was due to no fault of the plaintiff? In *Muthia Chetty* v. *Subbayyan,* 2 M. L. J, Rep. 294, the Madras High Court held that the parties not joined were not bound by a decree to which they were not made parties, though the non-joinder was due to no fault on the part of the plaintiff. The court observed "If they had no notice of their interest, they could not make them parties. Not having been parties to that suit, defendants are not bound by it but they are not entitled to ask that plaintiff's present suit shall be dismissed" In *Sankana Kalana* v. *Virupakshapa Ganashappa,* I. L. R, 7 B, 146, *Justice Kemball* delivering the opinion of the court said, "It is clear upon the authorities that the question of notice cannot possibly affect the rights of the subsequent incumbrancer to redeem. It is well established that, in order to obtain a complete title, the first or any subsequent mortgagee or incumbrancer who files a bill for foreclosure or sale must make all persons who have incumbrances at the time of the institution of the suit, posterior in point of time to his mortgage, parties to his suit; and that if such plaintiff should foreclose the mortgagor and such incumbrancers as he has made parties, yet he will be liable to be redeemed by any incumbrancer who might have been, but was not made a party to his suit, whether he had *any notice* of that incumbrance *or not.*" That non-joinder has not the effect of displacing a puisne incumbrance and that a puisne incumbrance subsists nevertheless with all its rights, also appear clear from the observations of the Privy Council in *Gobind Lal Roy* v. *Ramjanam Misser,* I. L. R., 21 C, 70 at p. 79. In the case of the *Ganga Pershad Sahu,* v. *The Land Mortgage Bank,* the judgment of the Calcutta High Court therein being extracted in I. L. R., 21 C, pp. 369, 370, the court held that non-joinder

however innocently brought about cannot have the effect of making a decree binding upon third parties. The court observed, "It cannot be denied that the plaintiff should have made the Bank a party to his former suit. That he did not do so was, so far as we can learn from the evidence, due to his ignorance of the Bank's mortgage. But, nevertheless, the plaintiff should not be allowed to have any advantage arising from that omission."

Thus I have come to the position that a mortgage decree is not binding upon third parties and cannot affect their rights, whether their non-joinder was wilful or not on the part of the plaintiff. I now pass to the third and last question which arises for discussion in considering the scope of S. 85. Does the question of knowledge on the part of the not-joined persons as regards the institution or continuance of the suit in which they were not impleaded in any way affect the binding scope of the decree? Third parties may be fully aware of a suit and yet may not themselves come in and apply to be made parties in it. Their rights cannot however on that account be in any way defeated. There is no obligation on their part to get themselves impleaded, simply because they happen to be cognisant of the suit. Mere knowledge of the suit cannot attach to them any such liability. The suitor acts solely on his own judgment, and his conduct is in no degree influenced by a stranger's failure to intervene. The provision of law which enables a third person to get himself impleaded as a party in a suit which may concern him and of the institution or continuance of which he may become aware, the provision which enables a third person to come in and claim as his own, property which may wrongly be attached and put up for sale as the judgment-debtor's, the provisions under which a person not bound by the decree may object to the delivery of property of which he may be in possession on his own account or may claim restoration of his possession with respect to property of which he may be dispossessed,—all these are only permissive and are obviously intended for the benefit of the various persons concerned. (See *Lalchand* v. *Lakharam*, 5 Bom. H. C. Rep., 139; *Protab Chunder Chowdhry* v. *Brojololl Shaha*, B. F. B. Rulings 638; &c.). It is not incumbent upon any one to have recourse to these provisions. The remedies they afford are only cumulative. If one does not choose to avail himself of them, the proceedings to which he is not a party, cannot bind him.

It is worthy of remark that S. 85 takes care to impose the obligation of joining the necessary parties only upon the plaintiff or the person that institutes the suit. It is unnecessary to quote any more authorities in support of the view that the provisions of law relating to the intervention of third parties in suits between others are only permissive and not obligatory so as to fix upon them a duty to intervene and that non-recourse to these provisions will not take away a person's rights under the general law. In fact the point seems to be concluded by the decision of the Privy Council in *Umesh Chunder Sircar* v. *Zahur Fatima,* I. L.R., 18 C, 164 (P. C.) In this case the plaintiff in his capacity as a puisne mortgagee sought to redeem the prior mortgagee who purchased the property subsequently in execution of the decree in a mortgage suit to which the plaintiff was not made a party. It was found that the plaintiff was fully aware of the sale about to take place in realization of the prior mortgage debt and had neglected to come in and redeem by paying up the amount of the judgment-debt. The main argument on behalf of Zahur Fatima, the defendant and prior mortgagee, was that the plaintiff's right of redemption was lost by the above circumstance. The Judicial Committee held that the question of notice on the part of the plaintiff was perfectly beside the point and that his right could not be taken away behind his back under proceedings to which he was no party. The purchaser could only take the property as liable to the contingency of redemption by persons holding outstanding interests. I may conclude this article with the following observations of their Lordships. "Certainly by that mortgage the right to redeem Zahur in a properly constituted suit was acquired; and it has never been lost because the plaintiff was no party to Zahur's suit. Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties."

M. K. VAIDYANATHA AIYAR.

NOTES OF INDIAN CASES.

Muhammad Said Khan v **Payag Sahu**, I. L. R, 16 A, 228. The decision of *Burkitt, J*, that S. 19 of the Limitation Act applies to applications for the execution of decrees is in accordance with the weight of authority—*Ramkumar Kur* v. *Jakur Ali,* I. L. R, 8 C., 716; *Toree*

Mahomed v. *Mahomed Mabood B*, I. L. R, 9 C, 730 ; *Venkatarav Bapu* v. *Bijesing Vithalsing*, I. L. R. 10 B, 108 ; *Ramhit Rai* v. *Satgur Rai*, I. L. R, 3 A, 247 ; *Janki Prasad* v. *Ghulam Ali*, I. L. R, 5 A, 201 ; *Fateh Muhammad* v. *Gopal Das*, I L. R, 7 A, 424. But a Full Bench of the Madras High Court has taken a different view in *Rama* v. *Venkatesa*, I. L. R, 5 M, 171. The difficulties pointed out by the Madras Court incline us to the view that the legislature could not have intended S. 19 to apply to applications in execution. But the language of the section is clear and we are not prepared to say that the other High Courts have made a mistake in the view they have taken of the meaning of the section.

Jagan Nath *v.* **Mannu Lal**, I. L. R, 16 A, 231. The decision commends itself to us on both the points dealt with. If the father is competent to bind his sons in an undivided family by alienations of family property for his debts, by acknowledgement of a debt and by a partition that he may effect among his sons without their consent, he can surely bind them by referring the question as to the share of the family property which belongs to his branch to arbitration in a dispute with his brothers. It is no objection to an award being filed under S. 526 that one of the grounds mentioned in S. 520 or 521 is raised. But the objection must be shown to be valid—See *Surjan Raot* v. *Bhikari Raot*, I. L. R, 21 C, 213. The conflict of authority on this question appears to be due to the fact of Ss 520 and 521 not mentioning objections as to their having been no legal submission or no award at all, in which cases there can be no doubt that the so-called award cannot be acted upon. The sections require a careful amendment in the light of the decision.

Muhammad Islam v. **Muhammad Ahsan** I. L. R, 16 A, 237. It would be open to question whether an application to execute a decree can at all come in under Art. 178, while Art. 179 specially provides for all applications for execution of decrees. See *Narayana Nambi* v. *Pappi Brahmani*, I. L. R, 10 M, 22. If Art. 178 did not apply to an application for execution of a decree for immoveable property where the date of delivery specified is several years from the date of the decree itself, the application to execute the decree would be barred before the right to apply accrued. Such a result would indeed be a hardship. The Legislature ought to make provision for such a decree in Art. 179 itself As the Article stands, we sympathise with the Allahabad High Court in their anxiety to bring the application within Art. 178. In the case under consideration the right to apply for delivery accrued on default in payment of any year's maintenance. The learned

judges construe the decree as creating a recurring right to apply at the occurrence of each default. We are not sure that Art. 178 contemplates the right to obtain delivery accruing any number of times. If, as we fear, the learned judges are wrong, it must be confessed they have only striven to do justice by extending the scope of Art. 178.

Badri Prasad *v.* **Bhagwati Dhar** I. L. R, 16 A, 240. The Full Bench of the Allahabad High Court hold that a pleader can be appointed only by the party or a recognized agent or an agent holding a special power of attorney. S. 39 of the Code which requires a writing for the appointment of a pleader and a written intimation to the Court by the client himself to cancel the engagement does not specify who should execute the *Vakalatnamah.* We have no doubt as to the intention of the Legislature, although it is not clearly expressed. If the party himself cannot orally appoint a pleader, can he orally authorise another to appoint him? The policy of the Legislature is to require the relation of pleader and client to be evidenced by writing. If the agent who appoints a pleader can be orally authorized, such evidence is not secured Although oral authority may be express under the Contract Act we agree with the Full Bench in holding that the words "expressly authorized" in Clause (*c*) of S. 37 imply a writing.

Hasan Ali *v.* **Siraj Husain,** I. L. R, 16 A, 252. We are sorry to observe once more that the Reporter has done his work in a slip-shod manner. There are three points decided in this case, but the Reporter has chosen to overlook two of them in his head-note. In addition to the ruling that on an appeal from an order of remand the High Court may dismiss the appeal to the Lower Appellant Court, the case decides two other points of interest. First the value of the subject-matter which determines the Appellate forum is the value as fixed by the plaintiff in his plaint, and secondly that where a suit in ejectment is dismissed on the ground that the defendant has a charge a second suit to redeem the charge is barred by *res judicata.* On the first of these propositions there is considerable authority in the Allahabad reports and we have also expressed our opinion before. The second proposition we take leave to question, for we think the authority of the Privy Council does not cover it. The causes of actions in the two suits are distinct and although they might have been joined, it seems to us, it cannot be said that they ought to have been. The suit in ejectment and the suit to redeem are somewhat inconsistent and the decision in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*, I. L. R, 20 C, 79, does not force us to adopt the view that the claim should have been made alternatively in the first suit: (See 3 M. L. J, 75).

Bhawani Prasad *v.* **Brij Lal**, I L. R, 6 A, 269 **and Raj-Kumar** *v.* **Bisheshar Nath**, I. L. R, 16 A., 270. These are two contradictory decisions of two learned judges of the Allahabad High Court in two separate cases. We have no doubt in expressing our agreement with the decision in the latter case. S. 209 of the Code of Civil Procedure simply enables a court to award future interest, but whether such interest will be a charge is dependent on the nature of the original liability. There is enough in S. 86 of the Transfer of property Act to indicate that the amount due referred to in S. 87 includes future interest. The Calcutta High Court in a recent case held that S. 86 compelling the award of interest at the contract rate up to the date fixed in the decree so far modified the discretionary rate awardable under S. 209 of the Code of Civil Procedure, in the case of mortgages. We certainly think that the Chancery practice of requiring payment of the principal, interest, costs and other charges calculated up to the date of payment before redemption has been followed in the Transfer of Property Act. There is no more reason for making costs a charge on the mortgaged property than for making future interest such a charge.

Queen-Empress *v.* **Tota Ram**. I. L. R, 16 A, 276. This case forcibly illustrates the absurd lengths to which an over-zealous Magistrate can stretch the provisions of the Arms Act. The servant who took his master's gun to the blacksmith's for repair and the blacksmith who kept it for the purpose of repair were convicted by the Magistrate for having been in possession without a license. Convictions of this description are calculated to render the provisions of this enactment ridiculous The High Court very properly set them aside.

Ganeshi Lal *v.* **Khairati Singh**, I. L. R, 6 A, 279. We have no doubt as to the correctness of the law laid down as to misjoinder. But the Madras High Court is in conflict with the other High Courts in this respect. It is time that the Legislature interfered and set the conflict at rest by making the language of the sections, if possible, clearer. We confess to a leaning in favour of the convenience of the procedure advocated by the Madras High Court. Whether in a suit for partition against the managing member where the alienees are also impleaded, or as in the case under consideration in a suit by reversioners for possession against the alienees of the widow, the balance of convenience is in favour of one suit being instituted against them all. We wish the Legislature had expressly authorised it. Even if this be not done, there can be no objection to the Legislature expressly declaring that an objection as to misjoinder falls within S. 578. Even without such an explanation added to S. 578, we are inclined to think it may fairly be read so as

to cover objections as to misjoinder. The tendency of the law is in favour of disregarding formal defects. Even want of pecuniary jurisdiction has been cured by the Suits Valuation Act Surely misjoinder of causes of action ought not to entail the penalty of dismissal of the action.

Janki Prasad *v.* **Ulfat Ali**, I. L. R, 16 A, 284. We are unable to accept this decision is correct, nor does the case cited, *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*, I. L. R, 16 C,355, support the conclusion arrived at by the learned judges. If property subject to a mortgage is purchased by a person and a decree is afterwards passed upon the mortgage, it is difficult to see how the purchaser can be regarded as the representative of the judgment-debtor in execution under S. 244. The purchaser derives no interest from the mortgagor after the date of the suit, nor does the mortgagor represent him. After the mortgagor had parted with the equity of redemption, there is no interest subsisting in him and a decree obtained against him cannot affect the rights of the purchaser. In the Calcutta case cited the equity of redemption was purchased after a decree was passed upon the mortgage and there was therefore force in the contention that the purchaser was the representative of the judgment-debtor under S. 244.

Madho Das *v.* **Ramji Patak**, I. L. R, 16 A., 286. There are several questions of interest decided in this case. The Allahabad Court has repeatedly held that what determines the jurisdiction of a Court is the value of the subject matter as stated in the plaint. The learned judges who decided this case are careful however to except cases where the plaintiff purposely overvalues or undervalues the claim. We have expressed before our opinion that the *ipse dixit* of the plaintiff cannot settle the value of the subject-matter. *Prima facie* it may be accepted. But where the defendant disputes the valuation, or the Court sees reason to think it incorrect, the Court has to determine the value. The fact that a portion of the plaintiff's claim is unsustainable does not affect the question of jurisdiction. The claim as made in the plaint must be valued for purposes of jurisdiction. If the Court finds the value of the claim to be in excess of its jurisdiction, it must return the plaint. Where the Court finds that the plaintiff is entitled to a larger sum in respect of the claim made than the limit of its pecuniary jurisdiction, it seems to us that the plaintiff must either forego his claim in respect of the excess or take the plaint back for presentation to the proper Court. This view is in accordance with the opinion of the Madras High Court expressed in *Chandu* v. *Kombi*, I. L. R, 9, M, 208 at page 213. We appreciate the difficulties pointed out by the Allahabad High Court against this view. But we think without a material change in the

language of the Legislature, however desirable, it is difficult to accept the view that a Court can give a decree for an amount exceeding its jurisdiction. See, however, *Mohee Lall* v. *Khetaram Marwary*, 25 W. R, 76.

On the next question as to whether the purchaser of the property of the judgment-debtor can be treated as his repersentative in execution of a money decree, there can be no doubt as to the correctness of the view of the learned judges. It would be different of course as pointed out by the Court, if the purchaser took the interest of the mortgagor after a mortgage decree had been passed against him. We cannot accept the opinion that the purchaser prior to suit of the equity of redemption is the representative of the mortgagor.

The decision on the last question is equally correct. It has been held that a partner's share in partnership property and the unascertained share of an undivided member in family property, may be attached and sold under S. 266 (See I.L.R, 13 M., 447). The principal's claim against an agent for balance due on an account or the vendor's claim for the balance of purchase-money cannot stand on a better footing.

Tajjo Bibi *v.* Bhagwan Prasad, I. L. R, 16 A., 295. There can be no doubt as to the correctness of the decision in this case. Equity which came to relieve the rigour of the common law in England became as artificial in its own way. Under the Transfer of Property Act the rules as to tacking and consolidation are not in force. We can see no objection to the mortgagor redeeming one of the mortgages executed by him to the mortgagee leaving the others to be dealt with afterwards. The language of S. 61 suggests no doubt that where the mortgaged property is the same, the rule of consolidation may be in force. But we think with the learned judges who decided the case that it is much too slender a basis for the position that a mortgagor is bound to redeem all the mortgages together.

Abdullah Khan *v.* Janki, I. L. R, 16, A. 303. The correctness of this decision appears to us doubtful. If there was no provision in the Registration Act for a suit being brought to compel registration, we should feel disposed to agree with the Allahabad High Court. We can see no distinction between this case and a suit to compel registration after the Sub-Registrar had refused it. If there was a right of action apart from the provisions of the Registration Act we cannot see how it could be taken away, merely because one step in the series contemplated by the Registration Act had been taken and the rest not. If the Full Bench of the Allahabad High Court in *Bhagwan Singh v. Khuda Bakhsho*, I. L. R, 3 A, 397, is right, there is no principle on which we can distinguish the present case. We think the right of action which would

exist independently of the Act must be held to be impliedly taken away by the special procedure prescribed by the Act. The Registrar is not bound to recognise a decree, nay is even prevented from recognising one, unless it has been passed under S. 77. The decisions of the Madras and Calcutta High Courts in *Venkatasami* v. *Kristayya*, I. L. R, 16 M, 341 and *Edun* v. *Mahomed Siddik*, I. L. R, 9 C, 150, seem to us to be sound.

Mubarak Husain v. **Bihari**, I. L. R, 16 A, 306. In the absence of a report of *Mr. Justice Mahmood's* judgment, we are unable to express any opinion upon the point which appears to have been decided on appeal. If the view of *Edge, C. J.*, and *Burkitt, J.*, be that notwithstanding an expression of opinion by one judge upon the points arising on the case which necessitated a finding on further issues framed, it is competent to his successor to express a different opinion on the same points after the return of the finding, we beg leave to differ. But if they mean, as we take it they do, that if findings were called for on certain issues without any judgment upon the other points, it is open to a successor to decide those points in a manner which precludes the necessity for the further issues, we do not think that exception can be taken to that view.

Moti Singh *v.* **Kaunsilla**, I. L. R, 16 A, 308. We think it is disgraceful to the Legislature that a party should have to lose his suit, because of a difference of opinion as to whether the plaint should be stamped as for one or for two declarations. It seems high time for the Court Fees Act to be completely recast so as to make it perfectly clear as far as it is possible for human wisdom to make it, what court-fee a man has to pay upon his plaint. A suit under S. 283 of the Civil Procedure Code is one upon which the greatest diversity of opinion has prevailed in the matter of the Court-Fee payable. There are cases which hold that an *ad valorem* stamp on the value of the property should be paid, other cases which hold that the stamp should be calculated on the value of the decree and yet again cases which hold that the plaintiff should value the consequential relief as he estimates it and pay a Court-Fee thereon–See the cases collected at p. 312 of O'Kinealy's Code of Civil Procedure. It seems to us that the view that a suit under S. 283 is ordinarily for one declaration is the correct one. There is much ingenious hair-splitting in the decision of the Full Bench as to whether the suit is for one or two declarations, the question apparently being determinable according as the decree-holder alone, or the decree-holder and the judgment-debtor are made parties by the claimant. We think the test is fallacious. The claimant almost always prays in effect for a declaration that the property is his own and therefore not liable to attachment. It may

be that the decree-holder bringing a suit after the claim has been allowed may pray for a declaration that the property is liable to attachment as the property of the judgment-debtor and also that in any view it is liable to attachment as the claimant is estopped The mere possibility of such a case arising is no argument in favour of the distinction drawn. The legislature ought to step in and sweep away these refined distinctions and enact some plain rules intelligible to all litigants. We wonder whether any cases are dismissed in England on a question of Court Fee like this. It is nothing less than a scandal to the administration of justice.

Moti Ram v Jeth Mal, I. L. R, 16 A, 313 and **Rani v. Ajudhia Prasad**, I. L R, 16 A, 315. The first of these cases must be taken to be overruled by the second The definition of an actionable claim is extremely unhappy in the Transfer of Property Act. We have however nothing to add to what we have said on this subject in 1 M. L. J, p. 289. Although a mortgage is the transfer of an interest in immoveable property and the mortgagee has therefore a right *in rem* yet inasmuch as there is a debt recoverable either personally or by sale of the mortgaged property, it seems to us that it is an actionable claim within the meaning of the words of S. 130 (See also *Muchiram Barik* v. *Isham Chunder Chuckerbutti* I. L. R, 21 C, 5 68).

Chenbasapa v. Lakshman Ramachandra, I. L. R, 18 B, 369. Can a plaintiff suing upon an unstamped promissory note, get a decree where the defendant admits execution? We should have been pleased, if we had seen our way to giving an affirmative answer to this question. But it seems difficult to put any interpretation upon the words "acted upon" in S. 34 of the Stamp Act other than the one placed by the Bombay High Court. We question the wisdom of the Legislature enacting a provision so stringent as to enable the defendant to defeat the plaintiff's claim, even where he admits execution. The English Law on this subject seems more reasonable. In a recent case before the Madras High Court, *Collins, C.J.*, and *Shephard, J.*, took a different view, but their attention was not drawn to the direction in the Stamp Act that the instrument shall not be *acted upon*.

Babaji v. Krishna, I. L. R, 18 B, 372. The question dealt with in this case is discussed by Mr. Mayne in the Chapter on Benami Transactions in his Hindu Law, Ss. 404 and 405, and we incline to the view which he has enunciated. He writes "The fact that A has assumed the name of B in order to cheat X, can be no reason whatever, why a court should assist or permit B to cheat A But if A requires the help of the court to get the estates back into his own possession, or to get the title

into his own name, it may be very material to consider whether A has actually cheated X, or not." The view of the Bombay judges is in accordance with this view.

Queen Empress v. Raiji Daji, I. L. R, 18 B, 380. There can be no doubt in this case. The summons which was disobeyed not having been issued by the Magistrate as such, he was undoubtedly competent to try the case. But the policy of the Law has evidently been frustrated by the language of the section. There can be no reason for regarding him as competent, merely because he issued the summons in a different capacity. If the policy of the Law be that the accused will not have a fair trial, if the disobedience for which he is tried is of the order of the trying officer, regard must be had to the sameness of the individual and not to the sameness of capacity. However as the language of the section stands, there can be only one interpretation of it.

Ramacharya v Anantcharya, I. L. R, 18 B, 389. The question in this case is one of nicety; but the balance of convenience is in favour of the view adopted by the Court Although in a suit for partition the whole property must be brought into hotchpot, the rule is subject to the limitation imposed by the law of procedure. The plaintiff being in possession of immoveable property in foreign territory cannot be non-suited on the ground that they must bring it into hotchpot as the process of the Court cannot reach the foreign territory. Nor can the partition be directed on the footing that the property in the foreign territory should be assigned to the plaintiff's share, for the plaintiff is entitled to claim an equal share of the property in British territory, as the defendant is also entitled to claim a share of the property in foreign territory. The reason of this would be obvious, if we supposed the immoveable properties were of different descriptions. The decision in this case will however not apply where both properties are in British territory but in different jurisdictions, for the Court in either jurisdiction is competent to entertain a suit for partition of the whole.

Hajrat Akramnissa Begam v. Valiulnissa Begam, I. L. R, 18 B. 429. This decision is the necessary result of the amendment of S. 647 recently made by Act VI of 1892. The amendment was made to prevent the application of the section made by the Allahabad High Court to cases of withdrawal of applications for execution and of failure to seek a portion of the relief in execution which was granted by the decree. The other High Courts in India had refused to follow the High Court of Allahabad in its application of Ss. 43 and 373 to applications for execution. The Allahabad Court justified its position by reference to S. 647. The Legislature intervened, but without confining the remedy which

it conferred to the application of Ss. 43 and 373 to execution proceedings enacted a general rule that S. 647 had no application at all to applications for execution. The consequence is that no part of the procedure applicable to suits can now be applied to execution proceedings. This cannot but be regarded as a regrettable result. Of course any procedure as regards suits not laid down by the Code, but is part of the inherent power of every Court will apply to execution proceedings as well The learned judges in this case speak of the procedure in Chapter VII as inapplicable to execution proceedings ; but the procedure in other chapters as well relating to suits is inapplicable to such proceedings. We agree that there is no power outside the Code requiring a Court to restore a suit dismissed for default. Such a power cannot therefore be invoked by an applicant for execution seeking restoration of an application dismissed for default.

Balamakundas Atmaram *v.* Moti Narayan, I. L. R, 18 B, 444. The Bombay High Court holds that registration of a prior incumbrance is notice to the subsequent incumbrancer, following the decision of the House of Lords in the Irish case of "*The Agra Bank* v. *Barry*." That being so, the mere fact of the prior incumberancer having neglected to keep the title-deeds himself does not estop him from claiming the priority to which he is entitled as the subsequent mortgagee had constuctive notice of the prior mortgage. We have already expressed our veiw on the decision of the Madras Court in *Shan Maun Mull* v. *Madras Building Company*, I L. R, 15 M. 268 (vide II Madras Law Journal, p. 308). The definition of 'notice' in S. 3 of the Transfer of Property Act which makes wilful abstention from an enquiry or search which a person ought to have made amount to constructive notice, suggests registration as possibly amounting to such notice. The Legislature may well put an end to this difference among the High Courts by the addition of a simple explanation to the section.

Collector of Kanara *v.* Rambhat, I. L. R., 18 B, 454. We have already discussed the question as to whether Government is entitled to appeal where the Court below failed to provide for payment of the Court-fee in a pauper suit (Vide I Madras Law Journal, p. 612). We are glad to have the support of the Bombay High Court in the view we then expressed.

The Bombay High Court very properly places a liberal interpretation upon the words 'Material irregularity in the exercise of jurisdiction' contained in S. 622 of the Code of Civil Procedure. Until the Privy Council restricts the meaning of that language as it has restricted the meaning of the word "legally," we shall continue to think with the

Bombay High Court that any error of procedure which causes a failure of justice is capable of rectification under S. 622. In a recent Full Bench case, the Madras High Court restricted the scope of its interference to the case of perverse decisions.

Dattatraya v. Rahimtulla Nurmahomed Khoja, I. L. R, 18 B, 456. The application for execution not having been made to the same Court, S. 295 could not apply. To entitle to rateable distribution, the section requires that 'more persons than one' should prior to the realisation have applied to the Court by which the assets are held, for execution of decrees for money—See *Gopee Nath Acharje* v, *Achcha Bibee*, I. L. R, 7 C, 553 and *Shumbhoo Nath Poddar* v. *Luckynath Dey*, I, L. R, 9 C., 920. In this case the applicant had not applied to the Second Class Subordinate Judge who realised the assets. A question might, however, arise as to whether in this case the Second Class Subordinate Court was the proper court to realise the assets. S. 285 requires the Court of the highest grade to realise the assets. The question however was not raised and we suppose the fact that the Second Class Subordinate Judge was executing a decree of the High Court in its original jurisdiction led to the jurisdiction of the Second Class Subordinate Judge to realise the assets being assumed.

Bai Chandaba v. Kuver Saheb Bapu Saheb, I. L. R, 18 B, 464. This case shows good manœvring on the part of the pauper plaintiff. In a pauper suit provision is made for the Court-fee, whether the plaintiff fails or succeeds, or the case is disposed of under S. 97 or 98. But withdrawal of a suit is none of these things; and so notwithstanding the anxiety of the Legislature to secure the court-fee the pauper plaintiff escapes scot-free. This is not perhaps, as it should be. The Legislature has to use better language to catch the dexterous plaintiff who does not mean to pay the Court-fee if he can help it. S. 414 cannot help in this case, for withdrawal is not vexatious conduct, nor a continuance of the suit.

Rozario v. Ingles, I. L. R, 18 B, 468. The judgment of *Candy, J.*, is very satisfactory. S. 481 of the Code of Criminal Procedure is perfectly clear and there can be no doubt of a married woman being allowed to claim maintenance for her illegitimate children from the putative father, except that the Law in England is different. It is one of the satisfactory features of the Evidence Act, that by the enactment of a simple rule it sweeps away a large mass of conflicting decisions of the English Courts. The Act has to be applied by judges of various grades and the rule enacted has therefore to be simple and clear. If a wife can give evidence as to non-access, there is nothing in

the Act which regulates the order in which the various items of evidence should be let in.

Perumal Udayar *v.* **Krishnama Chettiar,** I. L. R., 17 M, 251. A, trespasser is treated very strictly, we should say sometimes harshly, by the Court in an action for mesne profits. Thus the Allahabad High Court held that he is not entitled to credit for the expenses of collecting the income of the estate-*Shitab Dei* v. *Ajudhia Prasad,* I. L. R., 10 A, 13. See also *Ghoogly Sahoo v. Chundee Pershad Misser*, 21 W. R, 246. We doubt whether these rulings are now sustainable seeing that S. 211, C. C. P, defines mesne profits not as profits which the lawful owner might have received but as "those profits which the person in wrongful possession * * * actually received or might with ordinary diligence have received from the property." It may be that a wrong-doer may not be entitled to recover from the owner expenses of the cultivation of property of which he was in possession without a title. But we doubt whether he should not be always held entitled in action for mesne profits against him to set off all expenses which a prudent manager would have incurred in the management of the estate—see *Tiluck Chand v. Soudamini Dasi,* I. L. R, 4 C, 566. In the case in question, however, *Collins, C. J.*, and *Davies, J.*, had not to decide this point. The defendant who was sued for mesne profits got into possession under a revenue sale which was subsequently set aside on account of irregularity. The learned judges following *Dakshina Mohun Roy Chowdhry v. Saroda Mohun Roy Chowdhry* 20 I. A, 160, held that one who obtains possession by process of Court which is subsequently set aside cannot be regarded as a trespasser and could be made accountable only for the profits which he actually received or might with due diligence have received and must be given credit for all expenses *bona fide* incurred including costs of litigation.

Orr *v.* **Sundra Pandia,** I. L. R, 17 M, 255. *Collins, C. J.*, and *Shephard, J.*, hold in this case that when a party who complains that a document was obtained from him by fraud is in possession of the property to which the document relates, he is not bound to sue within three years to set aside the document, and that S. 28 of the Limitation Act does not extinguish the rights of a party in possession, but applies only to destroy the rights of a person out of possession. The learned judges do not discuss the question whether in cases where the person executing the document is out of possession, he is bound to set aside the document within three years. This is fully dealt with in our article on the subject, 4 M. L. J., p. 1.

Queen Empress *v.* **Mannatha Achari** I. L. R, 17 M, 260. It is to be regretted that in this case *Muthusami Aiyar* and *Best, JJ.*, had not

the advantage of hearing the question argued whether under S. 488 of the Code of Criminal Procedure, a husband is bound to show that he was willing to maintain his wife with the consideration due to a wife. The learned judges were apparently not aware that the ruling of this Court in *Marakkal* v *Kandappa Goundan*, I. L R, 6 M, 371, that mere willingness to maintain a wife, if coupled with the denial of her status, is not a sufficient defence to a proceeding under S. 488 of the Code was dissented from in a learned and elaborate judgment by the Bombay High Court in *In re Gulabdas Bhaidas*, I. L. R, 16 B, 269. The object of the Law is there pointed out to be to prevent vagrancy, and a wife whom her husband is willing to support, if she has any matrimonial grievance, must go to a Civil Court and cannot invoke the aid of a Criminal Court. We are inclined to think that the Bombay view is probably sounder than that which has been accepted in Madras The decision under notice will not be regarded as authoritative when the Court is asked to decide between it and the Bombay ruling, See. 2 M. L J., p. 318.

NOTES OF ENGLISH CASES.

In re **Clark** *Exparte* **Breadmore**, 1894, II Q. B. 393. A debtor who had been adjudged a bankrupt, but had not obtained an order of discharge traded without the knowledge of the trustee in the bankruptcy and thereby acquired property. He then executed a deed by which he assigned all his personal property to a trustee for the benefit of his creditors, and in consideration of the assignment the creditors thereby released him from their debts. The execution of the deed being an act of bankruptcy, he was again adjudged a bankrupt *Held* by the Court of Appeal that the property so acquired by the bankrupt must be distributed as assets in the first bankruptcy.

In re **Mauneir**, 1894, II Q. B. 415. A prisoner committed for extra dition on two charges of committing anarchist outrages in France by causing explosions at a *cafe* at certain barracks applied for a writ of Habeas Corpus :

Held that if the charges had depended on the uncorroborated evidence of an accomplice that would not be a ground for discharging the prisoner, for absence of corroboration was not conclusive in favour of a prisoner's right of acquittal, but the Magistrate had a discretion as to whether the evidence was sufficient to justify a committal; also that the outrages were not an offence of a political character within the meaning of S. 3, sub-section 1 of the Extradition Act 1870, for to constitute a political offence there must be two or more parties in the state, each seeking to

impose the Government of their own choice on the other, which was not the case with regard to anarchist crimes and therefore the prisoner was liable to extradition.

The Queen *v.* Judge of County Court of Oxfordshire, 1894, II Q. B, 440. Where a solicitor retained by a party to an action in the County Court instructs his clerk to appear and conduct the proceedings in Court on the client's behalf, such clerk, although he be a duly qualified solicitor and has had the general management of the proceedings in the action for the client, is not a solicitor acting generally in the action for the client within the meaning of S 72 of the County Courts Act 1888 and is not entitled to address the Court without the leave of the judge. The dictum of *Blackburn, J.*, in *Reg.* v. *Poona*, 18 L. T (M S) 325 that there can only be one attorney for a party at a time approved.

Clements *v.* London and North Western Railway Co., 1894, II Q. B, 482. Where a boy under age entered the service of the defendants, a Railway Company, as a porter and agreed to become a member and to be bound by the rules of an Insurance Society formed among the employees of the defendants towards the funds of which the defendants contributed and at the same time he signed an agreement by which he accepted the contribution and the advantages to which he may be entitled under the rules of the Society in lieu of any claims against the defendants under the Employers' Liability Act, *held* in an action for injury sustained by accident that it was competent for the infant to enter into the agreement to become a member of the Insurance Society as part of the contract of service and that as the contract taken as a whole was for the benefit of the plaintiff, it was binding on him and an answer to the action.

London County Council *v.* Herring., 1894, II Q. B., 522. A justice of the peace has jurisdiction under Sec. 73 of the Metropolitan Building Act 1855 to order the owner of a dangerous structure to take down, repair, or otherwise secure it, even though such structure is not adjacent to a highway and consequently is not dangerous to the public.

Reischer *v.* Borwick, 1894, II Q. B., 548. A ship was insured against damage from collision with any object, but not against perils of the sea. The ship ran against a snag in a river, and the collision causing a leak, the ship was anchored and the leak temporarily repaired so that the ship was out of immediate danger A tug was sent to tow the ship to the nearest dock for repairs, but the effect of the motion through the water was that the leak was opened again, and the ship began to sink and was run aground and abandoned.

In an action for damages for the total loss of the vessel, *held* that in asmuch as injury to the ship remained throughout, the collision was the

proximate cause of the damage and that the loss of the ship was covered by the policy.

Per Lindley, L J.,—An enquiry to a ship may fairly be said to cause its loss, if before that injury is or can be repaired, the ship is lost by reason of the existence of that injury, under circumstances which but for that injury would not have affected her safety.

The Glendra Rock, 1894 P , 226. In an action for damages for non-delivery of goods shipped under a bill of lading containing the usual exceptions but not excepting neglience, *held* that the burden of shewing that the defendants were not entitled to the benefit of the exception by reason of neligence lay upon the plaintiffs, the loss of the goods which had been damaged by sea water through the stranding of the vessel apparently falling within the exception.

Allen *v.* Allen and Bell, 1894 P., 248. The evidence of one party cannot be received as evidence against another party without the latter having the opportunity of testing its truthfulness by cross-examination.

In a divorce suit the evidence of the respondent is not admissible against a co-respondent if the judge refuses to allow the co-respondent to cross-exanine upon it.

When two prisoners are jointly indicted and a witness called by one of them gives evidence criminatory of the other, the latter has a right to cross-examine that witness.

A defendant may cross-examine a co-defendants's witness.

MISCELLANEOUS.

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The Canada Law Journal for July and August (*in exchange*).

The Canadian Law Times for July and August (*in exchange*).

The Green Bag for July and August(*in exchange*).

The Western Law Times for July and August (*in exchange*).

The American Law Review for July and August (*in exchange*).

The Law Book news from January to June (*in exchange*).

An apparent defect in the Code of Criminal Procedure.—Mr. C. E. Gray, Barrister-at-Law, Calcutta, writes :—In a rule which came before the High Court at Calcutta on September 5th last, to shew cause, why the commitment of one Rajchander Mazumdar to take his trial at the next Sessions should not be set aside, the following points of law arose. The

prosecution of the prisoner was sanctioned on the 5th of September 1893 on charges under Ss. 193 and 471 of the Penal Code.

The petition for the prosecution however was not presented till the 7th of March 1894, some days after the period of six months had elapsed allowed by S. 195 of the Criminal Procedure Code It was argued that as March 4th was a sunday and March 5th and 6th close holidays, the petition had been presented in time under S. 7 of the General Clauses Act I of 1887, as those three days could not be counted in the period of limitation. It was held however that this Act could not apply, as the Criminal Procedure Code of 1882 was passed before this Act. (see sec. 2) and that the period of six months allowed had been completed before the petition for the prosecution was presented. That being so, there could be no sanction to prosecute and the prosecution was illegal, as under S. 195 of the Criminal Procedure Code "No Court shall take cognizance of an offence under Ss 193 and 471 of the Penal Code, except with the previous sanction of such Court or other Court, to which such Court is subordinate." S. 537 of the Criminal Procdure Code however says that "No finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or on revision on account of the want of sanction required by S. 195." These two sections are evidently antagonistic to each other, although at first sight it would seem, that by the words introduced into S. 537, namely, "a Court of competent jurisdiction", the section could only apply in cases where a Court had competent jurisdiction and that would imply a Court with sanction to prosecute. In I. L. R, 10 B, 325 however those words "a Court of competent jurisdiction" were clearly defined and it was laid down that it must be taken to mean a Court of competent jurisdiction in respect of the particular offence charged, notwithstanding the fact that there might be an entire absence of all sanction. That would seem to be the correct explanation, as otherwise the clause inserted into Sec. 537 "of the want of any sanction required by S. 195" would be absolutely useless and nullified by the previous definition of what shall be the nature of the Court trying the offence.

Assuming all this however, the fact remains that Ss. 195 and 537 of the Criminal Procedure Code are entirely antagonistic to each other. The High Court at Calcutta however in making the rule absolute and quashing the commitment held that S. 537 must be taken to have been made subject to S. 195, and that it was not intended to override the provisions of S. 195 in this way.

The Sanitary Oath :—*Mr. Justice Day* is a Judge well and favourably known as holding the scales impartially, being a terror to evil-

doers and hardened offenders, but a merciful Judge to those brought before him for a first offence, and where the circumstances justify leniency. His impromptu remarks are generally distinguished by their strong common-sense and forcible reasoning. It is therefore, all the more to be regretted that he will persist in showing his antipathy to the oath with uplifted hand by making uncalled-for remarks when medical witnesses choose to avail themselves of that more cleanly mode of adjuration. Some months ago, while presiding at the Lancaster Assizes, he held up to the approval of the jury a medical witness who had kissed the Book, and to their scorn several others who had sworn with uplifted hand, remarking upon the absurdity of supposing that germs of disease could be acquired by kissing a Testament. More recently, while presiding at the Assizes at Bury St. Edmunds, Mr. Justice Day had to try, *inter alia* a case of Criminal assault, in which Dr. Reginald Roberts of Lowesloft was the medical witness. He expressed a desire to swear with uplifted hand, as he had a legal right to do, and as we are informed, he has always done for some time past. It was the duty of the official administering the oath at once to administer it to the witness in the form and manner requested. But Mr. Justice Day interposed the remark, his words being written down by a gentleman present in Court, 'By all means, if you think the New Testament a dangerous book ; and, turning to the jury, he observed, the gentleman wishes to take the sanitary oath.' Dr. Roberts adopted the dignified course of taking no notice of the judge's uncalled-for remark, though he might very fairly have answered that, while he did not think a Testament *per se* a dangerous book, he did think one which had been handled and kissed indiscriminately by a number of witnesses of all sorts and conditions was a dangerous book. Mr. Justice Day's new name for the oath will probably commend it to other witnesses and to jurors, who must naturally prefer a sanitary oath to one which presumably is insanitary. This objection to kissing the book is not a thing of yesterday, but for nearly six years past the law has sanctioned what Mr. Justice Day is pleased to term the sanitary oath to any person who may wish to take it. We have reached what is generally known as the 'big gooseberry' season, and if the lay Press, will, to use an expression of the day, 'boom' the sanitary oath as they have boomed many a less desirable thing they will confer a great benefit upon jurors and witnesses who, however much they may prefer not to kiss the Book, have not the courage of their convictions and do not wish to appear singular. While thanking Mr. Justice Day for giving us the name sanitary oath, we may remind him that the same oath possesses other merits to which he would do well to turn his attention. It is the more solemn form of oath, and its language is simpler

than that generally used. It is likely to impress witnesses and Jurors more solemnly, and especially the first time they take an oath. It is the more ancient form of oath, it cannot be evaded, and it puts all who take it upon an equality. There is only one way of raising the right hand. There are many ways of kissing or pretending to kiss a book. Mr. Justice Day has, in common with other judges, frequently complained of the amount of perjury committed in our Courts of law. Perhaps there would be less if the oath were administered, as it is in Scotland, by the learned Judge himself. Perhaps there will be less when any witness is required to repeat the words of the oath himself or herself. Meanwhile it is satisfactory for us to know, as we do, that neither the medical witness in Lancaster, nor Dr. Roberts will be deterred from taking the sanitary oath in future, but with other medical witnesses, will continue to set the example. The Act of 1888 requires the oath to be administered without further question: let us hope that in future it will be admistred without any such remarks as those uttered by the learned Judge.—*The Lancet.*

The value of Colonial Legal Appointments :—Lord Ripon, in reply to numerous applications from the members of the English bar for information with regard to the conditions necessary for candidates to legal and other appointments in the various colonies, has caused to be issued a brief summary of rules for the guidance of applicants. In those colonies (enumerated, and mostly unhealthy climates) the appointment rests with the Colonial office, but in any colony such as Australia, &c., the appointment to public offices rests with the Governor. Offices with emoluments from 100£ to 200£ are invariably filled by the Governor, who has the absolute disposal of the same, but in the case of salaries exceeding 200£ the Secretary of State has the power of nomination. Barristers are required as law officers and Judges, and in some instances as Magistrates. The salary of a Queen's advocate (who in some colonies, but not as a rule, is allowed to take private practice) varies from 400£ in the Bahamas to 1500£ in Jamaica and British Guiana; that of a puisne judge from 800£ in the Leeward Islands to 8,400 dollars in the Straits Settlements, and that of a chief justice, from 700£ in Bermuda to 2,500*l* in British Guiana. In British Gniana and Trinidad there are Magistrates with salaries varying from 500*l* to 800*l* to which barristers are usually appointed. Barristers are also required for the resident Magistrates in Jamaica, and for the district Courts in Cyprus, where the salaries range from 450 *l* to 500*l*. The salaries attached to appointments in West Africa are much higher, owing to the unhealthiness of the climate, and carry greater privileges with regard to pension

and leave of absence than elsewhere, and physicians and surgeons are also appointed to, these Courts. To sum up, the higher offices in the services are usually filled by promotion, and the lower by appointment of local Candidates, or by means of open Competitive examination.—*The Law Journal.*

Digest of Law Reports:—The Indian legal practitioner is at a great disadvantage owing to the absence of proper digests for the Indian Law Reports. The Government of India that is responsible for the publication of the Indian Law Reports ought to see to the publication of digests and current indexes for the reports. Woodman's digest was published in 1886 and the Supplemental Volume comes only up to the year 1889. The practitioner that has to find a case reported within the last five years has to wade through the indexes of twenty volumes for that purpose. We understand that the Secretary to the Vakil's Association of Madras drew the attention of the Government of India to this but the reply vouchsafed was that the index at the end of each volume was a sufficient assistance to the practitioner. Apparently the Government was disposed to think that the preparation of the index to each volume was a sufficient return for the price paid. We would have no objection to the Government charging a couple of Rupees extra for an index for each year, if the cost was a consideration deterring them from the publication of it. We would invite the attention of the authorities to the strong condemnation of Sir Frederick Pollock—no mean authority on the subject—in the preface to his recent Tagore Lectures on Fraud delivered in Calcutta. He writes "In this hope (viz., that his work may be of some use as a clue to the authorities) I am to some extent encouraged by the singularly defective state of the books of reference available in a search for Indian decisions. Although there has for many years been an official system of law-reporting in all the High Courts, the only digest of cases is now five years in arrear, and there is no kind of Supplement or current index, official or unofficial. Annotated editions of the codes exist; but they are with very few exceptions, so meagre and irregular in their references to adjudged cases as to be almost useless in that respect. In fact no one can at present be sure of knowing what Indian decisions have been reported on any given point unless he has read or at least searched the whole of the Indian Law Reports for five years. I must confess that I have not attempted any such feat and that I should have been in danger of over-looking important cases of the last five years but for the frequent and ready help of my predecessor in office, Mr. Caspers and other learned friends of the Calcutta bar."

Benami Transactions:—Our readers probably remember the chapter on Benami transactions in Mayne's Hindu Law. That valuable treatise is

disfigured by uncomplimentary insinuations and attacks against native character generally and Brahmins in particular. His valuable reflections on the history and development of the Hindu Law are in some places vitiated by his prejudice. He begins that chapter thus :—" There probably is no country in the world except India where it would be necessary to write a chapter on the practice of putting property into a false name." Again he writes, " In some instances the practice can only be accounted for by that mysterious desire which exists in the native mind to make every transaction seem different from what it really is." We are glad to note that Sir Frederick Pollock does not agree with Mr. Mayne. He says " Let me remark in passing that this description could be applied with substantial accuracy to the practice of conveying land to offeres to uses, as it prevailed in England for two centuries or more. Practices of this kind naturally grow up in a state of society where there is an appreciable risk, from one generation to another, of hostile conquest or confiscation. It would be surprising if they did not and, having regard to the political State of India both before and after the short lived prosperity of the Mogul Empire, I do not see the necessity of explaining the frequency of these transactions by some supposed innate love of secrecy in the minds of Oriental owners of property. Neither is there anything surprising in the persistence of habits of this kind after the reason for them has disappeared. Our modern life is full of these survivals in things great and small. Again, it is quite natural for ingenious persons to discover that the means of concealment which formerly were a shelter from the strong hand of princes and adventurers can be turned in peaceful times to the less ambitious but not less lucrative end of baffling creditors. With regard to the morality of such proceedings all honest men both in the East and in the West are agreed. No honest European who knows anything of business will pretend that the practice of them is unknown in Western countries. Conveyances to uses after the old fashion are no longer possible in England, but collusive or 'friendly' bills of sale of stock in trade and other moveable property are far from uncommon; and I am much mistaken if something very like *benami* does not go on among professional land agents, to whom land is merely a commodity of speculative purchase and sale, and whose floating liabilities often exceed their available resources."